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No. 07-297

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In The

Supreme Court of the United States

HAROLD E. HILL, et al.,
Petitioners,

v.

THOMAS E. KEMP,
Chairman, Oklahoma Tax Commission, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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October 9, 2007

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QUESTION PRESENTED

Should the Petition for Certiorari be denied in a federal 42 U.S.C. § 1983 civil rights case dismissed under the Tax Injunction Act, where Petitioners attempt to enjoin the collection of yearly registration fees assessed by the State of Oklahoma for specialty license plates displayed on motor vehicles:

(1) Where Oklahoma registration statutes were amended during appeal allowing groups, like Petitioners, to have their own type of specialty license plate that may express a family planning message, and

(2) Where Petitioners lack standing to challenge a registration scheme without establishing injury in fact, causation and redressability, and

(3) Where venue and Article III jurisdiction are unresolved legal issues that cloud the necessity of addressing Tax Injunction Act issues as raised by Petitioners, and

(4) Where the 10th Circuit Court of Appeals properly determined that yearly registration fees are taxes for purposes of the Tax Injunction Act?

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RESTATEMENT OF JURISDICTION

The Court lacks jurisdiction under Article III of the United States Constitution and the Tax Injunction Act, 28 U.S.C. § 1341.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Petitioners sue under 42 U.S.C. § 1983 for injunctive and declaratory relief in a state tax case when an adequate legal remedy exists. Venue was alleged under 28 U.S.C. § 1391(b).

RESTATEMENT OF THE CASE

Petitioners filed a federal 42 U.S.C. § 1983 civil rights complaint in the Northern District of Oklahoma against state officers, in their official capacities, seeking an injunction to ban yearly registration of specialty license plates on vehicles registered in Oklahoma.[1] At the time, the list of different types of specialty license plates available was long, but did not include one(s) the Petitioners preferred. The requested relief was to ban all specialty license plates (except inexplicably, Personalized License Plates, Physically Disabled License Plates and Hearing Impaired License Plates). Alternatively, Petitioners asked to ban two specialty license plates: Adoption Creates Families License Plates and Choose Life License Plates. The trial court ruling on Federal Rule of Civil Procedure

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[1] All defendants reside in the Western District of Oklahoma and venue is improper.

12(b) motions to dismiss held that the desired ban was an attack on state taxes and dismissed the complaint as required by the Tax Injunction Act, 28 U.S.C. § 1341. The 10th Circuit Court of Appeals affirmed.

While the matter was on appeal (and before the decision by the 10th Circuit Court of Appeals was entered) the specialty license plate statutes in Oklahoma were amended to allow groups to pay a yearly registration fee for a specialty license plate with a message to their liking.[2] Petitioners would be able to display their group's specialty license plates concerning family planning if they complied with the new statutes. Thereafter Petitioners could continue to display family planning license plates as long as they continued to pay yearly registration.[3] The 10th Circuit noted the change in the statutes this way:

> [Petitioners] are now free to apply for and receive a specialty plate demonstrating their support for abortion rights and even providing financial support to abortion-related programs. Appendix A at p. 11a.

Petitioners on appeal are challenging this amended statutory scheme, even though they have not been

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[2] To start a new specialty tag there would initially need to be 500 prepaid applicants under the new statutes. 47 Okl. Stat. Supp. 2006, §§ 1135.7 and 1135.8.

[3] Special license plates shall be renewed each year by the Tax Commission or a motor license agent. 47 Okl. Stat. Supp. 2006, § 1135.7(F).

frustrated in any attempt to garner specialty license plates containing their message under the new law. There is nothing in the factual record before this court from which one could conclude that Petitioners are suffering a continuing harm for which injunctive relief banning specialty license plates might be appropriate.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Where Petitioners Lack Standing to Challenge Oklahoma's Specialty License Plate Registration Scheme.

The questions presented by Petitioners concern the Tax Injunction Act (TIA), 28 U.S.C. § 1341. It is respectfully suggested that consideration of TIA issues are not ripe for consideration on the record before this court, as Petitioners have not met their burden of establishing standing to invoke Article III jurisdiction.

Even where Article III standing has not been raised by the parties, this Court is "obliged to examine standing sua sponte where standing has erroneously been assumed below.[4] *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("'[I]f the record discloses that the lower court was without jurisdiction this court will

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[4] Respondents raised standing in the trial court and it has not been ruled upon. *See* Petitioners' Appendix B at p. 58a, footnote 2 where the trial court states that standing, venue and ripeness have been raised, but she did not reach those issues.

notice the defect, although the parties make no contention concerning it'") (quoting *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263 (1936))." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).

Although this case began as primarily an attack on Oklahoma's "Adoption Creates Families License Plates" and "Choose Life License Plates" once on appeal matters changed. Initially there had been no statutory ability for Petitioners to garner specialty license plates with their desired message, absent legislative action. After the dismissal was appealed, Oklahoma amended its statutory registration scheme to allow a greater diversity in specialty car tags. As the 10th Circuit Court of Appeals noted: "[Petitioners] are now free to apply for and receive a specialty plate demonstrating their support for abortion rights and even providing financial support to abortion-related programs". *See* Petitioners' Appendix A at p.11a.

Petitioners take the counter intuitive position that the new statutes should be stricken, even though the new statutory scheme would allow them the ability to display family planning messages they desire. They assert that the new law impermissibly burdens their ability to garner specialty license plates, arguing that the new statutory procedures are "unreasonable" restrictions when compared to other specialty license plates procedures. Petitioners seek to strike down the very law that allows them to have their preferred specialty license plate.

Be that as it may, by taking this posture Petitioners have run afoul of Article III jurisdiction.

The record is devoid of factual support for their new position. Petitioners have never sought to use the new registration scheme and have never sought to have their message displayed. On this record there simply is no factual support for the assertion that the new statutes create constitutionally unreasonable restrictions with respect to these Petitioners. In other words, Petitioners make no allegations of an actual injury with respect to the registration scheme that currently exists. As a result, Petitioners allege no injury in fact and Article III jurisdiction is lacking. Petitioners have no standing to seek federal court jurisdiction.

Standing requires three elements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "[T]he party invoking federal jurisdiction bears the burden of establishing its existence. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 607-608, 107 L. Ed. 2d 603 (1990)." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998). "[A]n injury in fact [is] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

Here an injury by Petitioners is absent. There is merely a conclusory assertion that the new procedures are unreasonable. Petitioners have never alleged any attempt to use the new procedures and present

themselves before this court with no allegations of an actual injury in fact.[5]

Further, Petitioners did not establish redressability for Article III standing in the complaint or now on appeal. Petitioners ask to ban all but three specialty license plates (Personalized License Plates, Physically Disabled License Plates and Hearing Impaired License Plates).[6] *See also* Petition for Writ of Certiorari at p. 1, footnote 2. Alternatively, they ask to ban two specific plates: Adoption Creates Families License Plates and

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[5] Further, Petitioners cannot create causation by their own actions. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005).

[6] The complaint states:

> 163. Plaintiffs respectfully request that the Court grant the following relief:
>
> 164. Declare that the Statutory Scheme is unconstitutional; *and* enjoin the Defendant, their agents, and their successors in Office from implementing or further enforcing all provisions of 47 Okla. St. § 1135.1-1135.6 (with the exceptions of §§ 1135.1(B)(3), 1135.1(B)(5) & 1135.4; or, in the alternative,
>
> 165. Declare that allowing a special license plate expressing a different view is unconstitutional; *and* enjoin the Defendants, their agents, and their successors in Office from implementing or further enforcing all provisions of 47 Okla. St. §§ 1135.5(B)(22) & 1135.5(B)(23).

Choose Life License Plates. On appeal the ban request now centers upon the new sections of law.

In order to meet the requirements of standing, Petitioners must show that the injury about which they complain will "likely ... be redressed by a favorable decision" of the court. *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136. In this instant matter the relief they seek would function to prevent nearly everyone, including Petitioners, from displaying any specialty license plates. A favorable decision will not provide Petitioners with relief for Petitioners' alleged injury. Without redressability of the asserted injury, Petitioners lack standing. *See Steel Co., supra. See also Henderson v. Stalder*, 287 F.3d 374 (5th Cir.2002) and, *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir.2003) (rejecting challenge to Florida "Choose Life" plate for lack of standing).

Petitioners' purported injury as stated in their complaint is the unfulfilled wish to express themselves with specialty license plates, which they acknowledge is "a unique means of promoting their views."[7] They complain that the injury is this inability to express themselves, but the relief requested does not redress the alleged injury. Petitioners simply do not seek to establish redressability.

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[7] The complaint states:

> 17. Motorist Plaintiffs wish to express themselves in this manner because they believe a special license plate is a unique means of promoting their views about reproductive rights.

Article III standing does not exist. Accordingly, the necessity of reaching resolution of purported important TIA issues is lacking. The petition should be denied.

II. The 10th Circuit Court of Appeals Properly Applied Controlling Case Law with Respect to the Tax Injunction Act.

The two cases identified by Petitioners supporting their split-in-the-circuits argument were both denied review the same day, June 26, 2006, *Henderson v. Stalder*, 407 F.3d 351 (5th Cir.2005), *cert. denied*, --- U.S. ----, 126 S. Ct. 2967, 165 L. Ed. 2d 950 (2006) and *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006). And although those cases have dissimilar reasoning with respect to identifying what is a "tax" for purposes of TIA, both cases disposed of the matters in the same manner – plaintiffs fail in their attempt to ban the specialty license plates of others. The instant case has the same result.

Here the 10th Circuit Court of Appeals was asked to determine if the registration of specialty license plates under Oklahoma's registration scheme was a tax which prevented federal court intervention because of the Tax Injunction Act.

Petitioners suggest that this Court should categorize Oklahoma's registration system as a system similar to the purchase of a souvenir at a state park. This analysis fails under the facts. It glosses over or simply omits from consideration the recurring nature of registration. Although the first year might look a bit

like the purchase of a souvenir at the state park, the analogy collapses when one looks at the following year, and the next. One does not return each year to the gift shop and pay full price yearly in order to continue to display the souvenir. The registration system in Oklahoma requires yearly registration and yearly specialty tag fees.[8] Attempts to characterize yearly registration as a simple purchase are incorrect. The registration is a tax. The decision below was correct.

Petitioners next suggest that the TIA exception carved out in *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004), should be expanded to include the current factual circumstances. As the 10th Circuit correctly determined: "Simply put, the Court held that giving away a tax credit is a very different thing than assessing, levying or collecting a tax." The *Hibbs* exception has no applicability to a case where the protagonist wants to shut down the collection of motor vehicle registration. In effect, Petitioners want to stop the collection of recurring registration taxes. TIA prevents federal trial court interdiction.[9]

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[8] A few specialty tags do not have recurring yearly fees, but registration continues to be yearly.

[9] As the dissent notes in *Hibbs*:

> "The practical effect is that a literal reading of the TIA provides for federal district courts to stand at the ready where litigants encounter legal or practical obstacles to challenging state tax credits in

Finally, it is noted that this suit is prosecuted only as a 42 U.S.C. § 1983 suit. No other causes of action have been alleged. This Court ruled in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 589 (1995): "[W]e hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists." As that case demonstrates, Oklahoma can and has provided clear and adequate legal remedies. Petitioners' assertion to the contrary is specious.

The 10th Circuit Court of Appeals was correct in affirming the dismissal of Petitioners' claims.

III. Venue Is Improper in the Northern District of Oklahoma.

All State officials sued in this matter have their official residence in Oklahoma County, Oklahoma, which lies in the Western District of Oklahoma. Venue is improper in the Northern District of Oklahoma. The trial court dismissed this matter on jurisdictional grounds and has not addressed venue. *See* Petitioners' Appendix B at p. 58a, footnote 2.

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state courts. **And this Court, of course, stands at the ready to review decisions by state courts on these matters."**

Hibbs, 542 U.S. at 121.

Title 28 U.S.C § 1391(b) provides:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Public officer residence for venue purposes means the official, and not the actual, residence of the individual officer. For venue purposes, the residence of a state official is located at his official office, even if the state official maintains branch offices in other parts of the state. *See Neville v. Dearie*, 745 F. Supp. 99 (D.C.N.Y.1990). *See also Taylor v. White*, 132 F.R.D. 636 (E.D. Pa. 1990).

CONCLUSION

The petition should be denied for reasons stated above.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HAROLD E. HILL, MARGARET R. AND WILLIAM F. McCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, and BARBARA SANTEE,

Petitioners,

v.

THOMAS E. KEMP (Chairman, Oklahoma Tax Commission), JERRY JOHNSON (Vice Chairman, Oklahoma Tax Commission), CONNIE IRBY (Secretary-Member, Oklahoma Tax Commission), and BRAD HENRY (Governor),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ARGUMENT

Petitioners (or "Motorists") present several independent and compelling reasons for granting a writ of certiorari as to their claims, including that the Tenth Circuit's decision: *(a)* directly conflicts with at least one other circuit court; *(b)* is at odds with this Court's interpretation of the Tax Injunction Act; and *(c)* presents important questions of first impression requiring this Court's attention both *(i)* to ensure that all motorists—not just those residing in certain circuits—have direct access to a federal forum for resolution of important First and Fourteenth Amendment issues that are themselves the subject of a circuit split, and *(ii)* to prevent the Tax Injunction Act from becoming a means through which state-created viewpoint discriminatory private speech fora can be immunized from original federal jurisdiction.[1]

Respondents do not offer any serious rebuttal to Petitioners' explanation regarding the pressing need for this Court's review of the questions presented by the petition. For example, Respondents do not dispute the existence of a circuit split as to the application of the

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[1] These reasons have been repeatedly articulated by legal commentators. *See* Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 YALE L.J. 727, 733-34 (Dec. 2005); Howard J. Bashman, "Choose Life" Tags Appear Headed to Supreme Court, *available at* www.law.com (Mar. 27, 2006); Andy G. Olree, *Specialty License Plates: Look Who's Talking in the Sixth Circuit*, 68 ALA. LAW. 212, 215 (May 2007); Traci Daffer, *A License to Choose or a Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 889 (Spring 2007).

Tax Injunction Act to special license plate schemes, nor do they address the assertion that Petitioners' claims differ from those presented in *Hibbs v. Winn*, 542 U.S. 88 (2004), because Counts One through Four do not involve direct constitutional challenges to any aspect of the state's tax system. Respondents also do not disagree that additional litigation over the questions presented by the petition is likely to continue given the growing number of similar cases pending in the federal courts, the growing number of states selling (or refusing to sell) "choose life" special plates, and the very real risk posed by state-created private speech fora if the Tax Injunction Act continues to be applied as it was below.

Instead, Respondents seek to undermine the petition by depicting this case as a poor vehicle for resolving the significant questions presented. But that transparent and diversionary tactic is unavailing. Respondents' arguments that Petitioners lack standing and that venue does not lie in the district court below—arguments about which Respondents did not feel strongly enough to raise in the Tenth Circuit—lack merit and can be swiftly dismissed.

I. There Are No Impediments To This Court's Review.

A. Petitioners Continue To Have Standing To Assert Counts One Through Four.

Prior to enactment of Section 1135.7 by the Oklahoma legislature in 2005, the only special license plates permitted to be sold by the Oklahoma Tax Commission ("OTC") were those expressing a viewpoint that the legislature had codified. Section 1135.7 requires the OTC, as of January 1, 2006, to make "new" special plates available for use by motorists absent any codifying legislation, so long as the OTC has first received 500 pre-paid applications. 47 Okla. Stat. § 1135.7(B)(4) (Pet. App. E, 137a); *see also* Pet. App. A, 6a-7a.

Each of the 110 special plates (*i.e.*, those expressing a viewpoint specifically codified by the Oklahoma legislature) existing when Petitioners filed their complaint was grandfathered under Section 1135.7. 47 Okla. Stat. § 1135.7(G) (Pet. App. E, 139a); *see also* Pet. App. A, 10a-11a. Some of those plates had been authorized for immediate use, and remain available today, because more than 100 such plates had been purchased within a prescribed period after codification. 47 Okla. Stat. §§ 1135.3(A) & 1135.5(A) (Pet. App. E, 101a-103a & 115a-117a). Others had been authorized for immediate use, and remain available today, regardless of the number of each plate purchased following codification. Yet others had been authorized for use as soon as 100 paid applications had been received by the OTC (provided such payments were received within a prescribed time period after codification); those also remain available as such today. *Id.* Accordingly, each of

the "existing" 110 special plates was subject to far less stringent requirements than those applicable to "new" special plates under Section 1135.7.

The Oklahoma legislature remains able—despite enactment of Section 1135.7—to codify and authorize special plates for use once 100 paid applications for each plate are received by the OTC (provided such payments are received within a prescribed time period after codification). There is no hypothetical risk that the legislature will favor certain viewpoints in this manner—*it already has*. Specifically, the legislature codified in 2006—after enactment of Section 1135.7—at least five special plates displaying viewpoints that will be available for use by motorists as soon as 100 paid applications for each plate are received within the prescribed time period. The 100 paid applications requirement following codification is obviously less burdensome than the 500 pre-paid applications that are required in instances where, as here, the legislature elects not to codify a "new" plate displaying a certain viewpoint and instead forces motorists to utilize Section 1135.7. And because each of these five "new" plates has been codified by the legislature, Oklahoma's motor vehicle agencies can advertise their existence to accumulate quickly 100 paid applications. This stands in stark contrast to the five lone motorists who each would be forced under Section 1135.7 to marshal pre-paid applications from 499 other motorists for the identical expression on an identically-designed plate. *See* "Application for the 2007 Special License Plates," *available at* http://www.tax.ok.gov/mvforms/708-E-07.pdf.

Section 1135.7 is a smokescreen created by a legislative body intent on maintaining the challenged special license plate scheme as a mechanism for promoting the expression of certain viewpoints over others. It was for this reason that the Tenth Circuit squarely *rejected* Respondents' argument (made in their briefs and during oral argument) that Petitioners' claims had been mooted by Section 1135.7. Pet. App. A, 11a-12a (concluding that, despite "a significant step in allowing groups of all viewpoints to obtain specialty plates," there remains embedded in Oklahoma law "a difference arguably preferring one competing viewpoint over another"). Indeed, the challenged scheme on its face vests the Oklahoma legislature with unbridled discretion to make it more difficult for *all* disfavored viewpoints—not simply a pro-choice viewpoint—to be expressed in the speech forum involving special license plates.

This Court has long recognized the sufficiency for standing purposes of an injury caused by the state's creation of an un-level playing field in a private speech forum. *See, e.g., Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard.") (quotations omitted); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992) (government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). That is precisely the injury Petitioners allege here; the challenged special license plate scheme was facially unconstitutional when this lawsuit was commenced and remains so today, because it enables the expression of

all state-favored viewpoints by legislative edict, while it hinders *all* disfavored viewpoints through legislative inaction and administrative burden. Petitioners' injury is compounded by the fact that the state has created an un-level playing field in the arena of reproductive rights.

Moreover, this Court's decision in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-59 (1988), and its progeny reflect that Petitioners need not have attempted under Section 1135.7 to muster 500 pre-paid applications for their desired "pro-choice" special plate in order to satisfy the prudential standing requirement of injury. That is because *every* application of the challenged special license plate scheme is fraught with the potential for impermissible viewpoint discrimination. All that is required for Petitioners to satisfy the constitutional standing requirement of injury is evidence—as set forth in the First Amended Complaint—that they wish for, have sought, and were denied access to the forum in order to display a "pro-choice" view on the same terms as all other motorists (including those who share a contrary view of reproductive rights) are permitted.

Lastly, the remedy Petitioners seek—an injunction against the continued enforcement of the special license plate scheme creating this disparity, or, in the alternative, an injunction against the continued enforcement of the statutory provisions codifying the "choose life" special plate and the "adoption creates families" special plate—will plainly redress their continued injury. This Court has recognized, for example, that a plaintiff's injury manifesting itself in exclusion from statutory benefits

is redressable even if the desired remedy (*i.e.*, enjoining the statute) would result in denying the benefit to all potential recipients. *See, e.g., Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987); *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Orr v. Orr*, 440 U.S. 268, 271-73 (1979). For this reason, federal courts presented with similar challenges to state special license plate schemes have repeatedly held that enjoining a statutory provision that authorizes issuance of a special plate expressing support for a "pro-life" viewpoint would remedy the plaintiff's injuries by leveling the playing field in the reproductive rights debate.[2] Federal courts also have held that redressability would be achieved in similar challenges where plaintiffs seek to enjoin all of

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[2] *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir.) (plaintiffs' injury could be redressed by enjoining South Carolina statute authorizing "choose life" special plate, even though remedy "would not grant [plaintiffs] access to the license plate forum"), *reh'g and reh'g en banc denied*, 373 F.3d 580 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005); *ACLU of Tenn. v. Bredesen*, No. 3:03-1046 (M.D. Tenn. Mar. 12, 2004) (unpublished decision) (plaintiffs "allegedly injured by having their opposing viewpoint drowned out through exclusion from the government forum" could have their injury redressed through enjoining Tennessee statute authorizing "choose life" special plate), *rev'd on other grounds*, 441 F.3d 370 (6th Cir.), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006); *Henderson v. Stalder*, 287 F.3d 374, 387 (5th Cir. 2002) (Davis, J., dissenting) (plaintiffs had standing when "injured by the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing views," because injury could be redressed by striking Louisiana statute authorizing "choose life" special plate).

the statutory provisions constituting a state's special license plate scheme.[3]

B. Venue Properly Lies In The District Court Below.

Respondent Henry apparently agrees with Petitioners that venue is proper in the district court below and/or that consideration of venue issues has no place in the determination of whether to grant a petition for a writ of certiorari seeking further review of a threshold jurisdictional issue. In contrast, Respondents Kemp, Johnson and Irby argue that this Court should deny the petition based on the allegation that venue is improper in the district court below. Their argument fails for at least two reasons.

First, venue in a non-diversity civil action lies in any judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). "In the context of declaratory

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[3] *See Henderson v. Stalder*, 57 Fed. Appx. 213, 2003 U.S. App. LEXIS 930, at *1 (5th Cir. Jan. 9, 2003) (denial of rehearing en banc) (plaintiffs' injury would not be redressed by enjoining specific Louisiana statute authorizing "choose life" special plate; remanding to district court with instructions to dismiss unless plaintiffs amended complaint to seek injunctive relief against Louisiana's entire special license plate scheme); *Women's Emergency Network v. Bush*, 323 F.3d 937, 947 (11th Cir. 2003) (to remedy alleged injury where plaintiffs challenged specific Florida statute authorizing "choose life" special plate, court would be required to "instruct the State to close the specialty license plate forum altogether"—a remedy plaintiffs had not requested).

judgments or prospective injunctive relief regarding unconstitutional statutes, it has been held that [for purposes of Section 1391(b)(2)] suits challenging official acts may be brought in the district where the *effects of the challenged regulations are felt* even though the regulations were enacted elsewhere." *Bishop v. Okla. ex rel. Edmondson*, 447 F. Supp. 2d 1239, 1254 (N.D. Okla. 2006) (emphasis in original; quotations omitted); *see also Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001) (venue proper where harm is felt by plaintiffs).

Petitioners indisputably felt and continue to feel the effects of the challenged special license plate scheme in the Northern District of Oklahoma, where: Petitioners live and register their cars; Petitioners wish to express their desired viewpoint on special license plates; Petitioners attempted to purchase special license plates displaying their desired viewpoint; and other motorists can purchase special license plates displaying their desired (and, in some cases, opposing) viewpoints. It is therefore entirely irrelevant that venue *also* may be proper a mere 107 miles away in the Western District of Oklahoma where Respondents maintain their official offices.

Second, even if Respondents were correct that venue over Counts One through Four is proper only in the Western District of Oklahoma, any decision regarding the applicability of the Tax Injunction Act to those claims would be appealed to the Tenth Circuit—and it is the Tenth Circuit's decision on that precise issue on which Petitioners seek further review by this Court.

II. Respondents' Remaining Arguments Do Not Rebut The Compelling Reasons Presented For This Court's Review.

Respondents make a handful of cursory assertions—citing almost no support—intended to show that the Tenth Circuit's application of the Tax Injunction Act was correct. Each of these assertions purports to dispense in simplistic fashion with the complicated questions presented by the petition. Yet, it is precisely these questions that have split the circuit courts and led to misapplication of this Court's decision in *Hibbs*—and will likely continue to do so in the near future absent further instruction from this Court.

After acknowledging that—as the Sixth Circuit concluded in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 374 (6th Cir.), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006)—the purchase of a special license plate in fact resembles the purchase of a souvenir snow globe in a state park (or any other product sold by the state), Respondents assert that subsequent, recurring annual registration requirements render the amounts paid for the plates "taxes." This argument (raised for the first time) ignores the fact that the decision to continue expressing oneself via—and thus to register for—a special license plate remains a voluntary one. That annual payments are required to enter the forum each year has no bearing on their characterization as taxes versus contractual debts, fees, or something else altogether.

Respondents also urge that amounts voluntarily paid for special license plates are "taxes" simply because the state's intended uses of those amounts are for "purposes that are generally accepted as being funded through state taxes." Henry Opp. at 9. This reductive argument ignores the fact that not every dollar the government earns is a "tax." *See Bredesen*, 441 F.3d at 374 (voluntary payments are not taxes, "regardless of what the government does with the sales income").

Respondents' assertion that Petitioners seek an expansion of this Court's decision in *Hibbs v. Winn* misconstrues Petitioners' argument. Petitioners assert that the court of appeals (and the Fifth Circuit in *Henderson*) erroneously understood *Hibbs* to preclude a finding that the Tax Injunction Act permits federal courts to adjudicate constitutional claims that would exist even if the alleged "tax" were non-existent. Respondents make no effort to explain why *Hibbs* or the Tax Injunction Act should apply in such a circumstance. For this reason, Respondents' citation to *California v. Grace Brethren Church*, 457 U.S. 393, 417 (1982), is also misplaced; *Grace Brethren* involved claims by aggrieved taxpayers challenging the payment of their state unemployment taxes.

Respondents also seek to address the merits of Petitioners' First Amendment claims—an excursion irrelevant to the determination of whether Petitioners' claims are jurisdictionally barred by the Tax Injunction Act. Additionally, this argument mischaracterizes the nature of Petitioners' requested relief, which does *not* challenge Oklahoma's ability to fund adoption-related activities. Rather, Petitioners challenge the state's

restrictions on speech in a government-created public forum that operate to favor those viewpoints with which the state agrees. The availability of alternative means of expressing one's viewpoint—be it with a bumper sticker, painted car, or private banner plane—has no bearing on the underlying First Amendment analysis.

Finally, Respondents make a passing and inscrutable reference to *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 589 (1995). *Private Truck Council* held that Congress did not authorize state courts to award injunctive or declaratory relief under Section 1983 in cases directly challenging state taxes when there is otherwise an adequate remedy at law. *Id.* at 588. That holding has nothing to do with the question of whether Petitioners' claims are subject to the Tax Injunction Act in the first instance.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant a writ of certiorari.

Respectfully submitted,

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